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IN THE

Supreme Court of the United States

October Term 1948

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNEL IHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PEREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI and GENKICHI WADA,

Petitioners,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodrigues Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Toroichi Kanda, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi and Genkichi Wada respectfully allege:

A

SUMMARY STATEMENT OF MATTER INVOLVED

Petitioners are workers employed by several sugar plantations on the Island of Kauai, Territory of Hawaii, and are members of various local affiliates of the International Longshoremen's and Warehousemen's Union, a trade union.

Petitioners brought this action under the Civil Rights Act (8 U.S.C., Section 43) and Section 41 (14) of Title 28,[1] alleging upon four different grounds a deprivation, under color of territorial law, of rights, privileges and immunities secured by the Constitution of the United States and of rights secured by laws of the United States.[2]

FACTS

Factually, the background of the case is as follows:

In September, 1946, there was a strike in progress against the Lihue Plantation Company, Limited, a sugar plantation on the Island of Kauai in the Territory of Hawaii, called by the recognized exclusive bargaining representative of its employees, Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union, CIO. After the strike had been in progress seventeen days, on September 17, the Lihue Plantation Company applied to the respondent judge for an ex parte restraining order. The respondent judge issued a restraining order in the form

[1] Now 28 U.S.C., Section 1344 (3).

[2] Petitioners' complaint for injunction was in four counts (R. 5). The first three counts allege a deprivation of rights under the Norris-LaGuardia and Clayton Acts. The legal issues in the first three counts of the complaint are presented in *ILWU v. Wirtz*, 37 Haw. 404, affirmed 170 F. 2d 183, certiorari denied in No. 510 in the records of this court on February 28, 1948, petition for rehearing pending. This petition is directed only to count four of petitioners' complaint, which is based squarely on the deprivation of rights guaranteed by the First Amendment to the Constitution (R. 514).

requested by the company. The order restrained the International Longshoremen's and Warehousemen's Union, CIO;[3] Local 149 of said Union, which includes the employees of almost all the sugar plantations on the Island of Kauai; Unit 1 of Local 149, which includes the employees of Lihue Plantation Company; the individual officers of Unit 1 of Local 149; and unspecified John and Mary Does and Roes.

Thereafter on September 20, the above-named defendants in the equity action in the territorial circuit court moved to dissolve the ex parte restraining order on the grounds that the order issued violated the constitutional rights of the persons restrained, and that the court was without jurisdiction to issue it without complying with the provisions of the Norris-LaGuardia Act (R. 191). The respondent judge denied the motion. On September 23, 1946, on his own motion, he amended the restraining order and deleted therefrom restraints not requested by the petition of the Lihue Plantation Company (R. 196-197).

Insofar as here relevant, the ex parte restraining order, as amended, prohibited the above-named defendants in the equity action in the territorial court

> . . . until further order of this Court from *in any way* . . .
>
> (7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;
>
> And in Furtherance Hereof, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point

[3] A trade union with 30,000 members, in the Territory.

> and station when stationed at points of ingress to and egress from the petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion, and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other . . . and all pickets being also enjoined from *otherwise committing* any of the acts hereinabove prohibited. (R. 41, 45-46.)

Petitioners were indicted by the grand jury of the County of Kauai for unlawfully, feloniously and wilfully engaging in mass picketing and assembling with others, and congregating in crowds and for engaging in picketing with others in groups of more than three, in violation of these provisions of this allegedly lawful ex parte amended restraining order prohibiting such conduct (R. 18, 32).[4]

None of the petitioners were named in the territorial equity action and most of them are not employees of the Lihue Plantation Company nor members of the unit representing its employees. No conduct of the petitioners was complained of by the Lihue Plantation Company when it sought this ex parte order against the defendants in the equity suit. No copies of the order were ever served on petitioners. No fraud or violence is charged against the petitioners by the indictment—merely that they engaged in mass picketing and assembling with others and congregated in crowds of more than three, not being in motion.

Geographically, the scope of the ex parte order encompasses "on or near the real property of the Lihue Plantation Company, whether used for business or residence pur-

---

[4] The indictment is in two counts. The first count alleges a violation of paragraph 7 of the amended restraining order, and the second count, a violation of the in furtherance clause. No violation of any other provisions of the order are charged in the indictment. The information for summary contempt later substituted for the indictment likewise charges a violation of these provisions only (R. 355, 357).

poses." This includes 12,000 acres of land on the Island of Kauai, twenty company towns and camps in which the employees and their families live, miles of privately owned, but publicly used, roads and public highways and streets (R. 329).

Petitioners showed that the respondent judge had set the criminal contempt proceedings on his calendar for plea, and had informed them that he intended to proceed forthwith to try the petitioners.[5] They alleged that the respondents had already deprived them of rights of free speech and assembly and due process of law guaranteed by the Constitution, and had already violated their constitutional rights, and that unless restrained, respondents would proceed to prosecute and try petitioners for criminal contempt for alleged violations of the void order solely for engaging in peaceful picketing, and would, unless restrained, continue to deprive plaintiffs of due process and of their rights secured by the Constitution to be free from previous legal restraints or subsequent prosecutions for having engaged, in concert with others, in peaceful picketing and assembly during the course of a labor dispute. Petitioners alleged that they had no adequate remedy at law and showed exceptional circumstances and irreparable injury which they urged entitled them to equitable relief.[6]

---

[5] Petitioners showed the District Court, at the time the complaint was filed, that the respondent judge had refused a stay of the petitioners' trial pending determination by the Court of Appeals for the Ninth Circuit, in *ILWU v. Wirtz*, of the legal issues involved in the first three counts of the complaint, despite the fact that it is customary practice in criminal cases not growing out of labor disputes not to force the taking of more than one appeal on the same issues.

[6] Some of the exceptional circumstances and irreparable injury shown by petitioners in support of the allegations of their complaint are set forth in the opinions of the district court (R. 54, 314, 327-330):

1. That the respondent judge had refused to stay the criminal trial of petitioners while an appeal was being prosecuted involving similar issues.

2. That the respondent judge had already ruled adversely to petitioners' positions on all substantive issues of federal and constitutional law.

3. That the respondents engaged in a course of conduct to oppress and intimidate petitioners and other working men in Hawaii so that they would fear to exercise their rights.

4. That the petitioners were singled out and selected for prosecution under a statute never before invoked pursuant to a plan to intimidate and coerce petitioners and others in the exercise of their rights.

5. That petitioners were so singled out for prosecution from others because they were union officers.

6. That the pendency of the criminal contempt case is an employer weapon to instil fear, spread confusion and to weaken the Union to which petitioners belong and petitioners' rights.

7. That appeals would be costly and of no avail since the Supreme Court in *ILWU v. Wirtz* had ruled adversely to plaintiff's contentions respecting the Norris-LaGuardia Act.

8. That the respondent judge is the legislator, the wronged person, the prosecutor and the executor.

9. That the Territory claims the right under the *Lewis* case to punish for contempt of an order void because it violates rights guaranteed by the First Amendment.

10. That the amended restraining order violates substantive federal rights under the Clayton and Norris-LaGuardia Acts.

11. That the amended restraining order is void on its face and in violation of rights guaranteed by the First Amendment in that:
    a. It constitutes unjustifiable previous restraint upon petitioners' rights of free speech and of assembly.
    b. It narrowly and unreasonably circumscribes these rights at the very time when they are of most value and does so without due regard for the size and scope of the industrial conflict involving 100,000 I.L.W.U. members, 12,000 acres of land and twenty company towns and villages.
    c. The order is vague, ambiguous and confusing and places the risk of contempt unjustly upon pickets to determine just what it means.

In the course of argument and briefs, other offers of proof were made of exceptional circumstances and irreparable injury.

OPINIONS OF DISTRICT COURT

Upon application, and in accord with 28 U.S.C., Section 381, and Rule 65 of the Federal Rules of Civil Procedure, a temporary restraining order was issued against the respondent attorney general, his agents and deputies, and an order to show cause was issued against the respondents by the District Judge. On February 20, 1947, after extended argument on the order to show cause, a preliminary injunction to remain in effect pending hearing on the merits was issued by the District Court. The opinion of the District Court is reported in 69 F. Supp. 897 (R. 54-66). In issuing the injunction *pendente lite*, the District Court stated:

> However, in this case, and with reference to the facts alleged and the law involved in the plaintiffs' third and fourth causes of action, a preliminary injunction should and therefore will issue.
>
> . . . .
>
> Where exceptional circumstances of peculiar urgency are shown to exist, a Federal court may interfere with a State court or Territorial court for the purpose of inquiring whether or not a person is being held in violation of the Constitution and laws of the United States. . . .
>
> Now, should—or more pointedly—why should a preliminary injunction issue? Because in the absence of any Territorial law, and in the light of the definite Federal laws relating to permissible labor conduct—which laws the Territorial courts, too, must respect—there seems here to be a substantial question as to whether or not that which under Federal law may be allowable conduct can—by restrictions placed thereon by a court, however reasonable they might be — become, as the Supreme Court says, "the road to prison." (See *U. S. vs. Hutcheson*, 312 U.S. 219; *Thornhill vs. Alabama*, 310 U.S. 88; *Hague vs. CIO*, 307 U.S. 507.) In brief, with no questions of Territorial law involved at all, it looks as if Plaintiffs are in jeopardy because they did things which Federal law allowed.

Ten months later, on December 22, 1947—after numerous extensions of time granted with the approval of the court to the respondents, and after permitting the Hawaii Employers' Council to intervene as amicus curiae at the request of the respondents and over the objection of petitioners, and without permitting petitioners to be heard on the merits—the District Court dissolved the preliminary injunction and directed summary judgment on the merits of the respondents. The opinion of the court is reported in 74 F. Supp. 865 (R. 314-340).

OPINION OF COURT OF APPEALS

The Court of Appeals sustained the judgment of dismissal, but held that the District Court erred in granting summary judgment without hearing on the merits. Its decision is set forth at pages 384-391 of the Record. The Court of Appeals held that the complaint did not set forth a claim on which equitable relief should be granted, and hence, that petitioners were not entitled to a hearing on the merits.[7] It indicated that petitioners might have raised the constitutional questions in a Writ of Prohibition proceeding in the Territorial Supreme Court, and hence, by inference could not elect to proceed under the Civil Rights Act.[8]

---

[7] The Court of Appeals erroneously assumes that petitioners do not contend that these criminal prosecutions are not in good faith. Their complaint is that they have been deprived of rights guaranteed by the laws on Constitution of the United States, and they seek redress from the federal court because they have been injured, oppressed and intimidated in the exercise of those rights. Petitioners contend this is a matter of proof, to be determined on a hearing on the merits. In the District Court, the petitioners, the respondents, and the court proceeded, as is apparent from the record, on the assumption that the complaint for injunction raised the issue of exceptional circumstances and criminal prosecutions brought in bad faith.

B

JURISDICTION

This court's jurisdiction to grant this petition rests on the Act of June 25, 1948, 62 Stat. ....., 28 U.S.C., Section 1245 (1), which provides that cases in the courts of appeals may be reviewed by writ of certiorari granted upon petition of any party to any civil or criminal case before or after rendition of judgment or decree.

C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The issues raised by this petition are grounded upon the First and Fifth Amendments of the United States Constitution. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment,[9] so far as here relevant, provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

---

[8] In *ILWU v. Wirtz*, supra, referred to by the Court of Appeals in the decision, the appellants there raised, both in the Supreme Court of Hawaii and the Court of Appeals, the issue that the ex parte order there involved was issued without jurisdiction, because on its face it collided with the First Amendment, but neither court ruled on this contention.

[9] Paragraph V, count four of petitioners' complaint, erroneously alleges a deprivation of the due process clause of the Fourteenth Amendment, which applies to states, while the Fifth applies to territories.

D

QUESTION PRESENTED

Have petitioners been deprived of their constitutional rights of free speech and assembly, and of due process of law, by respondents under color of territorial law by the issuance of the amended restraining order prohibiting peaceful picketing and assembly, and by the prosecution against them for engaging in peaceful picketing and assembly, and are they entitled to a hearing on the merits of their complaint?

E

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

Issues of far-reaching importance to every working man and woman in the Territory of Hawaii, indeed to all the residents of the territories and possessions of the United States, are presented. Petitioners are threatened with being tried criminally for engaging in peaceful picketing and peaceable assembly. The decision below sanctions the action of a territorial circuit court judge in prohibiting in ex parte proceedings peaceful picketing and so narrowly circumscribing as to render meaningless the rights of free speech and assembly guaranteed by the First Amendment.

I

In the Territory of Hawaii, Congress has seen fit to exercise its power conferred by Article IV of the Constitution by legislating directly in part and in part by delegating legislative power to the territorial legislature, and by creating legislative courts to exercise judicial power. Both the power of the legislature and the power of the courts are to be exercised in a manner consistent with the Constitution and laws of the United States. Congress delegated to the

territorial legislature, and certainly to the territorial courts no greater power than it had under the Constitution. Even Congress could not, consistent with the First Amendment, abrogate and abridge the exercise of the rights of free speech and assembly or provide that only three persons could exercise these rights in concert. Yet the Court of Appeals has in effect sanctioned such an ex parte order issued by the respondent judge, in defiance of applicable decision of this Court. Thus, the exercise of arbitrary power by the territorial circuit court judges over free speech and assembly, denied to Congress by the First Amendment, is sanctioned.

II

This Court, in *United States v. Screws,* 325 U.S. 91, said:

> The specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by express terms of the Constitution or laws of the United States or by decisions interpreting them. Take the case of a local officer who persists in enforcing a type of ordinance which the court has held invalid as violative of the guarantees of free speech or freedom of worship. Or a local official continues to select juries in a manner which flies in the teeth of decisions of this court. If those acts are done wilfully, how can the officer possibly claim that he had no fair warning that his acts were prohibited by the statute? He violates the statute not merely because he has a bad purpose, but because he acts in defiance of announced rules of law. He who defies a decision interpreting the constitution knows precisely what he is doing.

Petitioners believe that the respondent judge, in issuing the ex parte order, acted in defiance of, and in flagrant violation of decisions of this Court defining the rights of free speech and assembly.

III

The amended restraining order issued by the respondent judge, and the prosecution of the petitioners for contempt of this order, is in violation of their right of free speech under the First Amendment as that right was defined by this Court in *Thornhill v. Alabama,* 310 U.S. 88. The order so narrowly circumscribes these rights by defining "mass picketing" as "three" that the substance of the right is destroyed. The proscription of the amended restraining order and the charge under it prohibits the overt act of peaceably assembling, and under the guise of regulation of "picketing en masse," conduct well within the bounds of peaceful picketing is proscribed. The mere invocation of the words "picketing en masse" cannot justify any restraint on free speech and assembly which a corporation asks for or a territorial circuit court judge sees fit to impose. This order does not meet the clear and present danger test; it does not even meet the test of reasonableness, assuming territorial courts can exercise police power.

IV

The amended restraining order issued by the respondent judge, and the prosecution of the petitioners for contempt of this order is in violation of the principle declared by this court in *Marsh v. Alabama,* 326 U.S. 501, that the fundamental rights of free speech and assembly occupy a preferred position in our scheme of government over property rights. This principle has been mutilated on the slender ground of a corporation's mere ex parte assertion that its property rights will be injured. On this ground, the means of free communication of petitioners and of hundreds of people living in company towns on the Island of Kauai have been denied, and fundamental rights of individuals to free speech and assembly have been hacked to size to meet the demands of a corporation.

V

The amended temporary restraining order must be judged on its face to determine whether petitioners have been deprived of rights guaranteed by the First Amendment. (*American Federation of Labor v. Swing*, 312 U.S. 287; *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287.) Petitioners have been charged under only those provisions of the order which prohibit mass picketing and congregating in crowds defined as three. Conviction on a charge not made would be a denial of due process. (*Cole v. Arkansas*, 333 U.S. 196.) When judged on its face, the order and the charge under it, not only conflict with the First Amendment, but are so vague and ambiguous as to constitute a denial of due process.

VI

In *Hague v. Committee for Industrial Organization*, 307 U.S. 496, this Court struck down a city ordinance which required a license from a local official for a public assembly on the streets or highways or in the public parks, although the official was empowered to refuse a permit only if refusal would prevent riots, disturbances or disorderly assemblages. The ex parte order, prohibiting as it does lawful, peaceful picketing and assembly, is the equivalent of licensing of the dissemination of facts in a labor dispute. Petitioners' complaint sets forth a cause of action within the principle of the *Hague* case and the rules laid down in *Douglas v. Jeannette*, 319 U.S. 157. Petitioners on the showing made and on their complaint were entitled to a hearing on the merits to prove their deprivation of rights, exceptional circumstances and that the criminal prosecutions were in bad faith. Grave questions of constitutional law and of deprivation of rights were raised by the complaint. This court has held

that it is inexpedient to determine such questions upon a demurrer to a complaint, or upon an equivalent motion if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer. (See Concurring Opinion of Justice Stone and Justice Cardozo, *Borden's Co. v. Baldwin*, 293 U.S. 194, 213.)

WHEREFORE, your petitioners pray that a writ of certiorari issue out of this Court to the Court of Appeals for the Ninth Circuit; that the order of the Circuit Court of Appeals be reviewed and determined by this Court, and the order finally reversed; and that your petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNEL IHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PEREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI and GENKICHI WADA,

By GLADSTEIN, ANDERSEN, RESNER & SAWYER,

By HERBERT RESNER,
Attorneys for Petitioners.

BOUSLOG & SYMONDS
By HARRIET BOUSLOG,
Of Counsel.

Dated: April 7, 1949.

No. .....

IN THE

Supreme Court of the United States

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Petitioners,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Theory of Petitioners' Complaint for Injunction.

Petitioners' complaint alleges that the respondents, acting under color of territorial law, had deprived them, and were threatening to continue to deprive them of rights guaranteed by the First Amendment to the Constitution. The issue raised by the complaint is that petitioners were being prosecuted under an indictment which charged them with feloniously violating an ex parte restraining order enjoin-

ing conduct which the First Amendment guarantees them a right to engage in.[1]

Only the indictment and the provisions of the amended ex parte restraining order alleged to be violated are relevant in determining what the charges against petitioners are and must be judged on their face to determine whether they collide with the guarantees of the First Amendment. Clearly, conviction on a charge not made would be a sheer denial of due process (*Cole v. Arkansas,* 333 U.S. 196).

II. Petitioners' Complaint States a Claim on Which Relief Can Be Granted.

Certainly there can be no doubt of the jurisdiction of federal courts to entertain suits under the Civil Rights Act to restrain criminal prosecutions since this court's decision in *Hague vs. Congress of Industrial Organization,* 307 U.S. 495, and *Douglas vs. Jeannette,* 319 U.S. 161.

But this Court has said that federal courts are not warranted in exercising jurisdiction to restrain the enforcement of unconstitutional statutes—here a void restraining order —or criminal prosecutions under such statutes unless the statute is void on its face and the operation of the statute will cause great and immediate loss to the complainant.

Plaintiffs believe that their complaint shows facts and their showing made on their application for a preliminary injunction—which was once granted and then dissolved by the District Court before hearing on the merits—entitled them to relief under a strict application of this rule. In any event, they have made a showing entitling them to a hearing on the merits.

---

[1] The information for summary criminal contempt substituted for the indictment charges a violation of exactly the same provisions of the amended order, and has the effect of robbing petitioners of a right to a jury trial and of forcing them to stand trial before a judge who has already ruled against their contention of violation of rights guaranteed by the First Amendment (R. 355, 357).

Yet, on a mere motion to dismiss, the Court of Appeals directed that their complaint should be dismissed. The District Court ruled as a matter of law and purportedly on the merits—but without a hearing on the merits—that petitioners' rights were not violated.

This Court has warned against deciding grave constitutional issues on a motion to dismiss or its equivalent. Thus Mr. Justice Cardozo in his concurring opinion in *Borden's Farm Products Company v. Baldwin*, 293 U.S. 194, 213, said:

> We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer.

See also

Dioguardi v. Durning, 139 F. (2d) 744 (1944);
Burt v. City of New York, 156 F. (2d) 791 (1946), and
Picking v. Pennsylvania, 151 F. (2d) 240 (1945).

It certainly cannot be said as a matter of law that any judge bound by the Constitution of the United States can decree that out of hundreds of farm workers on strike only three can exercise their right to peacefully picket and assemble simultaneously on country roads at points of ingress and egress. Nor can it be said as a matter of law that a judge can make the exercise of the right by such strikers to assemble in groups of more than three conditional on their remaining ten peripatetic feet apart.

The only justification that has been advanced for enjoining peaceful picketing since the outmoding of the lone missionary permitted in the *Tri-City*[2] case is a background of

[2] *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184.

violence flagrant and long continued. It certainly cannot be argued that on an ex parte assertion by an employer of violence in picketing and of irreparable injury an equity judge could issue an order against the general public directing that there be no assembling near this employer's property.

Whether restraints on peaceful picketing are justified—if they can be justified at all—must depend on facts, not law.

Where, as here, peaceful assembly has been enjoined and the engaging in peaceful assembly charged as a crime, appellants are surely entitled to some opportunity to show the facts on which they base their allegations of deprivation of rights guaranteed by federal law and of injury, intimidation and oppression in the exercise of those rights.

III. Petitioners are Entitled to a Hearing on the Merits Under Decision of This Court.

Where the order of an inferior federally-created court is void on its face because it infringes on personal liberties which the First Amendment guarantees to all citizens, any officer who acts under it acts under color of law and in abuse of law. For a federal court to permit the continuance of such an abuse is a denial of the sovereignty of the people. It places the forms of procedure above the substance of rights. It is an abdication of the very function which Congress directed federal courts to correct under the Civil Rights Act. To permit such an intolerable exercise of arbitrary power would quickly destroy respect for federal courts which extoll comity above right.

This Court, in *Lane v. Wilson*, 307 U.S. 268, very logically pointed out that no interpretation is necessary when a statute is void on its face, and hence the necessity of going to state courts first does not apply. (See also *Home Telephone and Telegraph Company v. City of Los Angeles*, 227 U.S. 278.)

This Court sustained jurisdiction in a federal court to strike down the flag salute regulation in *West Virginia v. Barnette,* 319 U.S. 624, and the invalidation of a Louisiana statute which had for its purpose the licensing of the press by the imposition of a gross receipts tax for the privilege of engaging in the newspaper business. *Grosjean v. American Press,* 297 U.S. 233. In *Hague v. CIO,* 307 U.S. 496, this Court held two ordinances void on their faces and restrained their enforcement. In *Douglas vs. Jeannette,* 319 U.S. 157, this Court sustained federal jurisdiction, but withheld the injunctive hand of the court, but granted in *Murdock v. Pennsylvania,* 319 U.S. 105, decided the same day, the relief prayed by the petitioners there.

Petitioners' allegations and showing meet the tests laid down in the *Jeannette* case for the establishment of a cause of action in equity.

The exceptional circumstances and irreparable injury shown before hearing on the merits in the district court, and set forth in its opinion (R. 54, 314, 327-330) are:

1. That the respondent judge had refused to stay the criminal trial of petitions while an appeal was being prosecuted involving similar issues.

2. That the respondent judge had already ruled adversely to petitioners' positions on all substantive issues of federal and constitutional law.

3. That the respondents engaged in a course of conduct to oppress and intimidate petitioners and other working men in Hawaii so that they would fear to exercise their rights.

4. That the petitioners were singled out and selected for prosecution under a statute never before invoked pursuant to a plan to intimidate and coerce petitioners and others in the exercise of their rights.

5. That petitioners were so singled out for prosecution from others because they were union officers.

6. That the pendency of the criminal contempt case is an employer weapon to instil fear, spread confusion and to weaken the Union to which petitioners belong and petitioners' rights.

7. That appeals would be costly and of no avail since the Supreme Court in *ILWU v. Wirtz* had ruled adversely to plaintiff's contentions respecting the Norris-LaGuardia Act.

8. That the respondent judge is the legislator, the wronged person, the prosecutor and the executor.

9. That the Territory claims the right under the *Lewis* case to punish for contempt of an order void because it violates rights guaranteed by the First Amendment.

10. That the amended restraining order violates substantive federal rights under the Clayton and Norris-LaGuardia Acts.

11. That the amended restraining order is void on its face and in violation of rights guaranteed by the First Amendment in that:
    a. It constitutes unjustifiable previous restraint upon petitioners' rights of free speech and of assembly.
    b. It narrowly and unreasonably circumscribes these rights at the very time when they are of most value and does so without due regard for the size and scope of the industrial conflict involving 100,000 I.L.W.U. members, 12,000 acres of land and twenty company towns and villages.
    c. The order is vague, ambiguous and confusing and places the risk of contempt unjustly upon pickets to determine just what it means.

This Court has said that the rule that courts of equity do not ordinarily restrain criminal prosecutions is subject to

an exception when there is a showing that the constitutional questions cannot be as readily determined in the criminal prosecution in state courts. Thus in *Terrace v. Thompson*, 263 U.S. 197, this Court said:

> But the legal remedy must be as complete, practical and efficient as that which equity could afford. Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the federal Constitution where it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the state is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity.

It needs no argument to show that the legal remedy to which petitioners would be remitted is not as complete, practical and efficient as equity affords.

Professor Borchard in his able article, "Challenging Penal Statutes," 52 Yale L. J. 445, says:

> The suggestion that the opportunity of becoming a defendant in a criminal trial is an adequate remedy at law and thus a bar to a bill of injunction is either not advanced at all, or where it is advanced, seems discreditable to the court.
>
> The liability to be tried as a criminal is no 'remedy' but a hazard, which the law should help the much regimented citizen to avoid by construing and interpreting inhibitory statutes in a civil proceeding where possible.

In *Truax v. Raich*, 239 U.S. 33, the plaintiff brought suit against the state attorney general and various other state officials to enjoin enforcement of the Arizona Anti-alien labor law and to restrain criminal prosecution of his em-

ployer under the Act. The application for an interlocutory injunction and the motion to dismiss were heard before a three-judge court.

The motion to dismiss was denied and an interlocutory injunction restraining the defendants from enforcing the Act was granted. This Court said:

> As the bill was framed upon the theory that the Act is unconstitutional and that the defendants who are public officers concerned with the enforcement of the laws of the state are about to proceed wrongfully to the complainants' injury with his employment, it is established that the suit cannot be regarded as one against the state.
>
> It is also settled that while a court of equity, generally speaking, has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments when the prevention of such prosecutions is essential to the safeguarding of rights of property.
>
> The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of an adequate remedy at law.

In *Ex Parte Royal*, 117 U.S. 241, this Court held that federal courts have jurisdiction to release on habeas corpus before trial on an indictment under a state statute repugnant to the Constitution. Whether the jurisdiction should be exercised in a particular case, the Court said was discretionary, but it qualified this by saying that the discretion must be "subordinated to any special circumstances requiring immediate action."

The second caution laid down by this Court in the *Jeannette* case for the determination of the propriety of exercising jurisdiction was that the state courts are the final

arbiters of the meaning and application of the statute subject to review. This principle really has no application when the statute is being attacked on its face as a direct violation of the First Amendment. This Court and not the state court is the final arbiter of constitutional rights. But in any event, the territorial judge has already held the ex parte order constitutional, and it is plaintiffs' contention the order and indictment under it are void and constitute a previous restraint on freedom of speech. It is certainly futile for plaintiffs to seek affirmation of the respondent judge's erroneous position when to do so means to submit to further deprivation of rights, and the dangers of summary contempt before the respondents who assert the power to punish even if the order is void and in violation of the First Amendment.

In the circumstances of this case, this Court said in the *Jeannette* case, we do not find irreparable injury. But as has already been pointed out, plaintiffs got in another case decided the same day a declaration of the unconstitutionality of the statute complained of.

In *AFL v. Watson,* 327 U.S. 582, trade unions, their officers and members sought to restrain the enforcement of a provision of the Florida Constitution on the ground that it conflicted with the fundamental human liberties guaranteed by the First Amendment and the National Labor Relations Act. This Court held that the allegations contained in the bill of complaint met the tests laid down in the *Jeannette* case, saying:

> This is a strict test. But we think appellants satisfy it. We reach that conclusion on the basis of the allegations concerning the disruption of the collective bargaining processes and the injury to the unions and to the employers alike, if the closed shop agreement is outlawed. . . . The loss in bargaining position by the unions, the disruption of harmonious relationships be-

> tween the union and the employers, the almost certain decrease in union membership—those are matters involving intangible values. Section 267 of the Judicial Code forbids the maintenance of suits in equity in the courts of the United States 'in any case where a plain adequate and complete remedy may be had at law.' But in view of the character of the intangible interests at stake, we cannot see how any remedy at law in the federal courts would be adequate.

Since the Florida Supreme Court had not yet construed the provisions of the Constitution, and since the provision was not void on the face, although it was susceptible of a void interpretation, this Court directed the three-judge district court to retain jurisdiction of the bill until it could determine the questions presented in the light of the state court's interpretation. Here the attack is directed to the face of the order. No interpretation can validate it.

All the cases discussed up to now have assumed that the state officers were acting in good faith and as required by law. It is the petitioners' contention that the respondents are subjecting petitioners to a deprivation of rights under a restraining order unconstitutional by express interpretations of this Court in First Amendment cases, and subjecting petitioners to criminal prosecutions for violation of that void restraining order and for engaging in conduct protected by the First Amendment.

In the *Screws v. United States,* 325 U.S. 91, case, this Court upheld the constitutionality of the conspiracy section of the Civil Rights Act against a charge that the law was so vague that it set up no reasonably ascertainable standard of conduct. This Court in rejecting that contention said:

> The specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by express terms of the Constitution or laws of the United States or by decisions interpreting them.

> Take the case of a local officer who persists in enforcing a type of ordinance which the court has held invalid as violative of the guarantees of free speech or freedom of worship. Or a local official continues to select juries in a manner which flies in the teeth of decisions of this court. If those acts are done wilfully, how can the officer possibly claim that he had no fair warning that his acts were prohibited by the statute? He violates the statute not merely because he has a bad purpose, but because he acts in defiance of announced rules of law. He who defies a decision interpreting the constitution knows precisely what he is doing.

There indeed is the meat and substance of the petitioners' case. In the civil section, of course, a showing of a wilful deprivation is not necessary. But it is petitioners' contention that the action of respondents under color of territorial law flies in the teeth of announced decisions of this Court which are controlling.

IV. The Amended Restraining Order and the Criminal Prosecutions of Petitioners Under It Violate Petitioners' Rights Under the First Amendment Under Decisions of This Court Interpreting Those Rights.

Petitioners contend that the respondents have, under color of law, deprived them of rights of free speech and assembly under the First Amendment as defined by this Court in *Thornhill vs. Alabama,* 310 U.S. 88, *Carlson v. People of California,* 310 U.S. 106, *American Federation of Labor v. Swing,* 312 U.S. 321, *Thomas vs. Collins,* 323 U.S. 516, *Marsh vs. Alabama,* 326 U.S. 501.

The question involved is whether, consistent with these opinions of this Court, a circuit court of the Territory can prohibit peaceful picketing and can circumscribe the rights of free speech and assembly guaranteed by the First Amendment as narrowly as the respondent judge has done in his

amended ex parte temporary restraining order without hearing and without finding in accordance with the principles of due process of great and imminent danger to the state and the public.

What in fact does the order of the respondent judge encompass? He has provided that the members of the International Longshoremen's and Warehousemen's Union shall not "in any manner . . . mass picket or assemble in crowds . . ." on or near the real property of the petitioner—which includes public highways — whether used for business or residence purposes — 12,472 acres comprising 20 company towns — or to interfere with ingress to or egress from said real property.

Mass picketing or congregating in crowds is defined as groups in excess of three at any point of ingress and egress and at other points groups larger than three must be in motion. Even this limited activity must not otherwise violate any of the provisions of the order.

All powers exercised by the Territory either through its legislature or its Courts are exercised by virtue of delegation from Congress. The power of Congress is limited by the Bill of Rights. The First Amendment unequivocally provides:

> Congress shall make no law . . . abridging freedom of speech . . . or the right of people peaceably to assemble.

In the case of the Territory, which derives its power from Congress, these fundamental liberties are not transmitted through the privileges and immunities clause of the 14th Amendment for they are a restriction on the power of Congress itself.

Petitioners are not here contending that the Territory has no power to regulate labor unions and their activity. What petitioners question is the power of a circuit court to

so narrowly define mass picketing without regard to the nature, size and scope of the industrial conflict as to sweep within its ambit both lawful and unlawful conduct in vague, indeterminate language, the construction of which can only be determined in attempted prosecutions.

Petitioners contend that Congress itself could not so narrowly define the rights proscribed by this sweeping previous restraint on the exercise of these fundamental rights.

The principle of *Marsh v. Alabama*, 326 U.S. 501, that the fundamental rights of free speech and assembly occupy a preferred position has been mutilated on the slender ground of a corporation's asserting that its property rights in company towns are denied.

Indeed, the same district court, in two other cases, *Hall vs. Hawaiian Pineapple Company*, and *Hall vs. California Packing Company*, 72 F. Supp. 533, which were brought as a result of two sweeping ex parte injunctions issued by another territorial circuit court judge, held the cases moot because the strike was broken before the return day on the Order to Show Cause, and no contempt proceedings had yet been instituted, said of an order somewhat less restrictive than the one here:

> Maybe the one he (Judge Moore) issued is — and I think it is — too broad in relation to the size and geographical width of the strike. Perhaps, too, I might agree that the order does not keep in mind *Marsh v. Alabama*, 326 U.S. 501, to the effect that Federal rights are exercisable as fully in company towns and villages as elsewhere. Perhaps, too, further investigation upon the return to Judge Moore's order to show cause would show that the many are being penalized for the isolated action of the few and that very definitely there is room for keeping in mind the Supreme Court's admonition that the court itself should so draft the decree that it does not take an attorney to interpret it.

The restraint on free speech and assembly contained in the ex parte temporary restraining order and the indictment must be judged on their face upon the clear principle laid down in *Thornhill v. Alabama,* 310 U.S. 88 (1940). The indictment against the petitioners is a general one framed in the words of the amended temporary restraining order. The respondents do not have to show that the respondent judge could have constitutionally written a different order covering their actions, for

> Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute and not the accusation or the evidence under it, which proscribes the limits of permissible conduct and warns against transgression.

It is clear from the opinions of this Court in *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U.S. 287, and *American Federation of Labor v. Swing,* 312 U.S. 321, that a restraining order of a court of equity, like a statute, must be judged on its face to determine whether there is a conflict with the First Amendment. At page 308 of the *Meadowmoor* case, Justice Black, in his dissenting opinion, stated:

> There is every reason why we should look at the injunction as we would a statute, and if upon its face it abridges the constitutional guarantees of freedom of expression, it should be stricken down. The injunction, like a statute, stands as an overhanging threat of future punishment.

And Justice Frankfurter, who wrote the opinion of the court in both the *Meadowmoor* and *Swing* cases, said in the *Swing* case:

> It would be improper to dispose of the case otherwise than on the face of the injunction.

In the *Thornhill* case, this Court said:

> In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.

And in *Thomas vs. Collins,* 323 U.S. 516, 530, this Court said:

> For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds will not suffice. These rights rest on a firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissable limitation.

V. Issuance of Amended Order and Prosecution of Petitioners is Not Justifiable by Clear and Present Danger or Any Decision of This Court Defining Impermissible Limits of Exercise of Rights.

It is true that the rights of free speech and assembly are not unqualified rights, and where the clear and present danger tests are met, the exercise of those rights may be regulated in the public good.

Thus, in the *Thornhill* case, this Court made it clear that

> We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to those interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.

But we are not here concerned with a legislative enactment, narrowly drawn to cover a precise situation. Surely, the words "picketing en masse" cannot be so woodenly and arbitrarily applied that Congress, or the territorial legislation, or least of all, the respondent judge, can by invoking the words "picketing en masse," justify any restraint on free speech and assembly they might see fit to impose.

And again, in the *Meadowmoor* case, the court held that the sovereign state of Illinois could choose to exercise its police powers through its constitutional courts and under the facts there found could restrain even peaceful picketing. That case, however, did not involve an ex parte hearing issued without notice. The lower court in Illinois, after lengthy hearings by a master, denied an injunction against any conduct except acts of violence. The time schedule in that case was as follows: The acts of violence alleged extended over a period of three years; picketing began eight months after the alleged acts of violence; it was four years afterwards before the trial judge granted an injunction, limited to violence alone; five years before the Supreme Court of Illinois directed a more stringent injunction against peaceful persuasion, and seven years before the United States Supreme Court sustained the injunction. The injunction was based on a finding of the master that because of the past acts of violence, even peaceful picketing would evoke fear in strangers to the dispute. It is obvious from the majority opinion that but for the long and extended hearings, the findings of fact, that the same result would not have been reached. Thus the court says:

> Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality.

The majority of this Court said that Illinois could choose to exercise its police power through its courts consistent

with the Fourteenth Amendment. Congress itself has empowered territorial courts to exercise only the judicial power and has delegated to the legislative the power to legislate on all rightful subjects not inconsistent with the federal constitution and laws. It must be remembered, also, that the Fourteenth Amendment does not transmit to residents of states all the rights guaranteed by the Bill of Rights. But the Territory of Hawaii is limited directly by the First Amendment. In the police power under the Fifth and Fourteenth Amendments, the test is the reasonableness of its exercise and not the clear and present danger test under the First.

But even assuming that a territorial court can exercise police power, the conduct of the respondent judge is not justified if the warning of the majority of the court in the *Meadowmoor* case—that it is of prime importance that no constitutional rights be defeated by insubstantial findings of fact screening reality—is heeded.

Legal scholars, Congress and the courts have always considered affidavit proof and partisan testimony, where the right of cross-examination is lacking, insubstantial and unreliable in labor injunction cases. Thus Justice Frankfurter, who wrote the court's opinion in the *Meadowmoor* case, in his book, *The Labor Injunction,* says:

> In labor cases, however, complicating facts enter. The injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Morover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted. Choice is not between irreparable damage to one side and compensable damage to the other. The law's con-

> undrum is which side should bear the risk of unavoidable irreparable damage. Improvident denial of the injunction may be irreparable to the complainant; improvident issue of the injunction may be irreparable to the defendant. For this situation the ordinary mechanics of the provisional injunction proceedings are plainly inadequate. Judicial error is too costly to either side of a labor dispute to permit perfunctory determination of the crucial issues; even in the first instance, it must be searching. The necessity of finding the facts quickly from sources vague, embittered and partisan, colored at the start by the passionate intensities of a labor controversy, calls at best for rare judicial qualities. It becomes an impossible assignment when judges rely solely upon the complaint and the affidavits of interested or professional witnesses, untested by the safeguards of common law trials—personal appearances of witnesses, confrontation and cross-examination.

And again Justice Frankfurter, after pointing out the fact that most judges, in the heyday of the hated labor injunction, followed the general rule that picketing per se is an admission of violence, said further:

> To expect such a mode of hearing to elicit the truth about these ambiguous acts and motives of men is to look for miracles. To ask such a system of procedure to work without serious friction and without arousing wide skepticism regarding law's fair-dealing is to subject the legal order to undue stress and strain. The chancellors of the fourteenth and fifteenth centuries pursued more rational methods of eliciting truth. . . . This ancient wisdom has been forgotten in the most sensitive contact between law and feeling. To quote Judge Amidon again ". . . affidavits are an untrustworthy guide for judicial action . . . it is peculiarly true of litigation growing out of a strike, where feelings on both sides are necessarily wrought up, and the desire for victory is likely to obscure nice moral questions and poison the minds of men by prejudice. . . .

> Experience . . . has caused me to be so incredulous of affidavits that I have required in all important matters the presence of the chief witnesses upon each side at the hearing. These witnesses have been subjected to oral examination. The court has had a chance to observe their demeanor. A comparison of the picture produced by their testimony with that produced by their affidavits has proven the utter untrustworthiness of affidavits. Such documents are packed with falsehoods, or with half-truths, which in such a matter are more deceptive than deliberate falsehoods."

Petitioners submit there can be nothing but insubstantial findings of fact screening reality in ex parte hearings, and that when a judge assumes to go beyond restraining acts of violence alleged by an employer to have occurred and restrains even peaceful activity, he has exceeded his power and made a mockery of the Bill of Rights.

But this Court, in the *Meadowmoor* case, did not stop with the warning against insubstantial proofs. It pointed out that the master found, and the Illinois Supreme Court rested its decision on a finding that because of the past violence of bombings and window smashing, third persons would be intimidated because . . .

> The momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicts our own experience to warrant our rejection.

The Court here referred to violence which included window smashing, bombing and burning of stores and physical violence extending over a period of four years.

Surely, acts alleged by an employer to have been committed a day or so before an ex parte hearing cannot justify a restraint against peaceful picketing and assembly on the part of all sugar workers on the Island of Kauai and all

other workers belonging to the same union, the International Union and all activity on, at or near the thousands of acres of the employers' property or the 20 company towns in which the employees live.

It is apparent that the ex parte amended restraining order is an order designed to break a strike. We are not concerned here with narrow city streets and crowded industrial areas, but with an agricultural strike involving large areas and large numbers of employees. Let us assume, for example, that an employer having procured an order limiting picketing to three persons, set into operation what the La-Follette Civil Liberties Committee described as a Mohawk Valley Plan whereby every means of communication and public pressure is used against employees to defeat their morale, and to assure them that the strike is broken. Under such circumstances, picketing is the only means which the employee has to communicate his faith in collective action.

It is obvious that if a circuit court of the Territory has the power on mere ex parte representation by an employer to so narrowly limit the right to picket, then an invincible sword has been forged to strike to the heart every labor organization in the Territory.

Even under the Fourteenth Amendment, where states, it is said, may exercise their police power through the judicial arm, the test of reasonableness must apply.

Even assuming for the argument, under this count of appellants' complaint, that a circuit court may limit the numbers of pickets, surely that limitation must be reasonable in the light of the facts and circumstances, and surely the order must be couched in language so that men of common understanding can understand and interpret its meaning.

Appellants respectfully submit that the amended temporary restraining order and the information under it, which charges no act of fraud or violence, violates appellants'

rights of free speech, and is void because it is vague and ambiguous and includes within its scope lawful as well as unlawful conduct.

If a territorial circuit court judge, on ex parte application, can issue such an order as the one here issued, and if petitioners can be prosecuted under it, petitioners and their fellow workers in Hawaii are back at the point which Senator Norris eloquently described:

> There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."
> It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

Respectfully submitted,

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